

## 6. Transmission of HIV

### 6.1. Criminalization of HIV Transmission

The Report issued by Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust<sup>21</sup> revealed that more than 36 out of 45 surveyed countries treat the transmission or putting at risk of transmission of HIV as a criminal offence. The highest number of court sentences passed on these grounds were found in Austria, Sweden and Switzerland, while in countries such as Bulgaria, Luxembourg and Slovenia, transmission or risk of transmission to third parties are not regarded as a criminal offence.

In the UNAIDS report "Criminalization of Transmission of HIV infection"<sup>22</sup> it is stated that the criminal codes of some countries treat transmission of HIV infection or putting other persons at risk of contracting the HIV infection as a punishable criminal offence. However, there are no clear indications that broad criminalization of transmission of HIV infection can ensure either proper service of justice in the courts, or prevention of transmission of the HIV infection. Moreover, this type of practice may even have an adverse effect on public health and human rights. Therefore, UNAIDS appealed to the governments to limit this type of punishment to cases of deliberate transmission, by persons who were aware of their HIV positive status and acted with deliberation to spread the infection. In addition, punishment should not be applied if the risk of transmission was low, if the offender was not aware of their HIV positive status or of the ways the disease can be communicated, if the other party was previously informed of the HIV positive status of the partner, if the offending party failed to discover the HIV positive status because of danger of violence or other negative consequences, if the offending party did take necessary protective measures to diminish the risk of transmission, e.g., use of condoms.

Instead of criminalization of HIV transmission, countries should expand the programmes and measures that have been proven to contribute to reduction of the transmission rate, thus securing protection of human rights both of the persons living with HIV and the persons who are HIV negative.

The UNAIDS document "Criminalisation of Transmission of HIV Infection" and the recommendation No. 4 of the International Recommendations in Connection with HIV/AIDS and Human Rights<sup>23</sup>, indicate that the countries are obliged to ensure safe application of criminal code provisions in connection with transmission of HIV in accordance with international obligations regarding protection of human rights<sup>24</sup>.

<sup>21</sup> Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust, 29 June 2005

<sup>22</sup> Criminalisation of HIV Transmission, UNAIDS, August 2008

<sup>23</sup> International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version, Office of the UNHCHR and Joint UN Programme on HIV/AIDS

<sup>24</sup> First of all, the right to privacy, the highest available standard of health protection, non-discrimination, equal access to justice (Articles 3, 7 and 12 of the Universal Declaration of Human Rights and Article 12 of

*To tell or not to tell? There is no specific legal provision which imposes an obligation of communication of HIV positive status to sexual partners. It is necessary to respect rules on safe intercourses unconditionally i.e. avoid putting the partner in danger.*

### 6.2. Criminal Responsibility in Serbia

The Criminal Code of 2005, in addition to retaining the transmission of contagious diseases in general as a criminal offence (Article 249), also introduced the transmission of HIV as a punishable offence into national legislation for the first time. The legislators introduced harsh prison sentences (from one to five years) for transmission of infection to another person (Article 250, paragraphs 2 and 3). In addition, putting somebody at risk of contracting HIV is punishable by a prison sentence of up to two years, even if no transmission of the virus occurred (paragraph 1), as well as transmission of HIV by negligent behaviour (paragraph 5). The legislators provided no clarification regarding the type or level of negligence or failure to act that is punishable. The harshest sentences are applied in cases when the transmission of HIV results in the death of the infected person (paragraph 4). It is evident that the intention of the legislators was to deploy harsh sentences to prevent the spread of HIV, emphasizing the responsibility of the virus carrier for spreading of the infection. It is not clear whether the criminal responsibility of an HIV infected person should be the same in cases of a minor negligence (e.g. injury at work!) and in cases of deliberate endangerment of other persons at risk of contracting the infection, which could be open to different interpretations, especially if we bear in mind the specific characteristics of HIV infection (three established ways of transmission and a theoretical possibility of transmission through other types of contact, e.g. a kiss). There is no recorded court practice in Serbia that could indicate how the courts might interpret and apply these provisions. Theoretically, these provisions open the possibility of criminal procedures that could not be justified from an ethical point of view (e.g. if a person did not know they were HIV positive, or if he/she had done everything to protect the partner). So far there has been only one court case based on these grounds.

Criminalisation of HIV transmission disregards personal responsibility for one's own health and the general obligation of prevention and protected sexual intercourse, which should be insisted on in general.

***In terms of protection of human rights and the dignity of all citizens, it is necessary to revise the attitude towards criminalization of HIV transmission and to strengthen programmes of positive prevention which reduce communication of disease. It is necessary to consolidate provisions of the Criminal Code of Serbia which regulate transmission of HIV infection in order to enable integration of public health protection and respect of human rights.***

International Covenant on the Economic, Social and Cultural Rights)